Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

RONALD CRAIG WILEY,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What is the probative force necessary to require the admission of exculpatory evidence tending to show that an offense was committed by someone other than the accused?

2. May evidence which can be said to raise a reasonable doubt be excluded on the basis that it could potentially confuse jurors?

3. What is the standard for review of excluded exculpatory evidence for purposes of analyzing whether a State has abrogated a defendant's federal constitutional right to present a defense?

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CITATION TO OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is published. *Wiley v. State,* 74 S.W.3d 399 (Tex.Crim.App. 2002). A copy of the opinion is attached in the Appendix. (Appendix – A).

JURISDICTION

This cause arises from a prosecution for arson. On direct appeal to the Texas Court of Appeals, the judgment was affirmed. *See Wiley v. State*, No. 03-99-00047-CR (Tex.App. – Austin, delivered August 10, 2000) (unpublished) (Appendix – B).

The Court of Criminal Appeals granted Wiley's petition for discretionary review, and affirmed the conviction. *See Wiley v. State*, 74 S.W.3d 399 (Tex.Crim.App. 2002) (Appendix – A). Wiley sought rehearing, but his motion for rehearing was denied on May 15, 2002. This petition for certiorari to the Texas Court of Criminal Appeals is due on August 15, 2002.

Wiley invokes this Court's jurisdiction pursuant to 28 U.S.C. §1257(a). The Court has jurisdiction to hear this petition under the United States Constitution's Sixth and Fourteenth Amendments, as well.

The petitioner has served a copy of this petition on the Attorney General of Texas under 28 U.S.C. §2403(b).

CONSTITUTIONAL PROVISIONS INVOLVED

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST., amend. VI.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST., amend. XIV, Section 1.

STATEMENT OF THE CASE

A. Prior Proceedings

A jury convicted Ronald Wiley of arson and sentenced him to ten years confinement in the Texas Department of Criminal Justice, Institutional Division. The conviction was affirmed on appeal. *Wiley v. State*, 74 S.W.3d 399 (Tex.Crim.App. 2002). A motion for rehearing was filed, but overruled on May 15, 2002. (Appendix – C) (white card of denial of rehearing).

This Petition for Writ of Certiorari is due on August 13, 2002, and is timely filed.

U.S. Supreme Court Rule 13.1.

B. Facts Material to the Question Presented

On the morning of June 6, 1995, Petitioner's restaurant, "Little Bit of Texas Grille & Bar," located in Thrall, Texas, was consumed by fire as a result of arson. (Vol. IV, p. 96). A week before, on May 30, 1995, Thrall police had been called to the restaurant to investigate an attempted arson. (Vol. V, p. 58) An empty butane bottle was found inside next to a gas can and another can containing what appeared to be a mixture of oil and gas. (Vol. V, pp. 59-60) A candle, which had been placed on the floor next to a hot water heater, was still burning when police arrived. (Vol. V, p. 60) Wiley was out of town when the arson attempt was reported, but spoke with police by telephone. (Vol. V, pp. 57, 61)

The day after the fire, on June 7, 1995, Wiley gave a statement for insurance purposes to Felix Lopez of the Barron Risk Management Services. (Vol. VII, p. 187; Vol. XV, State's Exhibit 30) Wiley told Lopez that on the morning of June 6, 1995, he awoke at 5:30 a.m. with a "gut feeling that something wasn't right." (Vol. VII, pp. 197-198; Vol. XV, State's Exhibit 30, p. 3) He drove to the restaurant from his home in Rockdale and found the back door slightly ajar. (Vol. VII, p. 198; Vol. XV, State's Exhibit 30, p. 4) After retrieving a pistol from his pickup truck, Wiley entered the restaurant where he heard a loud noise, then saw "a big flash to my right hand side." (Vol. VII, p. 199; Vol. XV, State's Exhibit 30, p. 4) Wiley ran outside, drove to a nearby Texaco station, and told the attendant to

call the fire department and the gas company because the building was on fire. (Vol. VII, p. 199; Vol. XV, State's Exhibit 30, p. 4) He then drove three blocks to the home of his brother-in-law, Steve Ging, who was on the volunteer fire department. (Vol. VII, pp. 199-200; Vol. XV, State's Exhibit 30, p. 4) Wiley returned to the restaurant and cut the gas off himself. (Vol. VII, p. 200; Vol. XV, State's Exhibit 30, p. 4)

Wiley informed Lopez that there had been "a couple of gas leaks" in the building. (Vol. VII, p. 199; Vol. XV, State's Exhibit 30, p. 4) He also explained that he had been receiving strange telephone calls after he had fired an employee about a month before the fire. (Vol. VII, p. 211; Vol. XV, State's Exhibit 30, p. 12) Because of the gas leaks he and his girlfriend, Sharon Schertz, had been living in her house in Rockdale rather than in the restaurant's small apartment. (Vol. VII, p. 207; Vol. X, p. 126; Vol. XV, State's Exhibit 30, p. 9) The only persons having keys to the restaurant besides himself were Wiley's girlfriend Sharon, and his sister-in-law and brother-in-law Debbie and Steve Ging. (Vol. VII, pp. 209-210; Vol. XV, State's Exhibit 30, p. 11) Wiley told Lopez that several years ago he had suffered two prior fire losses on different properties not related to the restaurant. (Vol. VII, pp. 217-219; Vol. XV, State's Exhibit 30, pp. 16-17)

After attempting to recover on his insurance policy, Petitioner filed a civil suit against Penn America Insurance Company. (Vol. 9, p. 58) On October 11, 1995, and October 16, 1996, Petitioner gave depositions in connection with the civil suit, in which he related a story similar to that given to Lopez. (Vol. 9, pp. 63-79, pp. 85-120) On February 4, 1998, Wiley appeared before a grand jury, and answered questions regarding the fire. (Vol. 4, pp. 221-244)

Almost three years after the fire, on March 4, 1998, Wiley was indicted for the instant offense. (CR, p. 7) Wiley and the State entered into a written stipulation that "the business known as A Little Bit of Texas was destroyed by fire or an explosion caused by the combustion of natural gas or gasoline with intent to destroy the building . . . known as A Little Bit of Texas[.]" (Vol. 4, p. 93; Vol. 15, State's Exhibit 1)

The destruction of Wiley's restaurant by arson was not disputed. The sole issue was whether Wiley or someone else was responsible. Wiley wanted to introduce evidence that a known arsonist, Charles "Moose" Thomas, was kicked out of the A Little Bit of Texas Grille & Bar restaurant the weekend before the fire, was present on the morning it burned and was arrested that morning. (Vol. IX, pp. 140-145; Vol. X, p. 204; Vol. XVI, Defendant's Exhibit 29) The trial court excluded the evidence. Had the jury heard this evidence, they might have had a reasonable doubt that Wiley was the perpetrator, and in fact may have acquitted him. Wiley grounds his argument for all the excluded evidence (deposition excerpts and a live witness) on the Sixth and Fourteenth Amendments to the United States Constitution as well as the Texas Constitution.

During the testimony of State's witness Captain Randy Traylor of the Williamson County sheriff's office, Petitioner's trial counsel discovered Thomas' prior arson offense when he was finally given access to Traylor's offense reports. (Vol. V, pp. 121-132; Vol. XVI, Defendant's Exhibit 10) The reports, admitted for purposes of a hearing on the suppression of exculpatory evidence, showed Thomas was convicted of attempted arson on July 13, 1992. (Vol. V, pp. 122-123; Vol. XVI, Defendant's Exhibit

15; Appendix, A-1) Counsel stated that he knew of "Moose" Thomas, but did not know that "Moose" was Charles Thomas, or that he had a prior conviction for attempted arson. (Vol. V, pp. 123-124)

Wiley later sought to introduce evidence that Thomas was in the restaurant the weekend before the fire, and was seen standing across the street from the restaurant while it was still burning. (Vol. IX, pp. 140-146) This attempt came after the trial court had allowed the State to read into the record portions of Wiley's civil deposition taken on October 16, 1996, through testimony of the insurance company lawyer, Pat Mullen. (Vol. IX, pp. 85-120) Defense counsel argued, "under Rule 106 I'm entitled to complete the document. I have read parts that certainly from my perspective did not give out the entire picture of the deposition[.]" (Vol. IX, p. 142) The prosecutor objected that "[t]his opens up an entire can of worms, and . . . it's going to take at last (sic) half a day to put out this fire" because the State would be forced to "warrant him over here . . . bring in his mother . . . bring Dr. Coons . . . bring the prosecutors initially here . . . and three police officers who saw him the day of the fire who say that he's nuts." (Vol. IX, pp. 143, 145) After the trial court sustained the objection (Vol. IX, p. 145), Petitioner made a bill of exception, which consisted of the excluded portion of the deposition:

> A. I throwed out a black guy out of the restaurant Saturday night.
>
> * * *
>
> And this guy . . . I'm on the way to the restaurant, this black guy at 6:00 a.m. in the morning is almost to the Texaco station up the street. When I come back from by brother-in-law's house

> he's standing across the street back 100 yards from the restaurant, sitting there watching it burn[.]
>
> Q. Do you know who he is?
>
> A. Moose is all I know.
>
> * * *
>
> Q. And this was Moose that you saw at your establishment –
>
> A. Right.
>
> Q. – or up at the Texaco and then back at the establishment?
>
> A. Right. * * * The sheriff's department that morning of the fire picked up Moose, had him in the car for breaking into somebody's pickup or something[.] . . . And they had him down there at the fire thing. And this fire – deputy fire marshal told me he wasn't the one that done it.

(Vol. XVI, Defendant's Exhibit 29; Vol. 9, pp. 267-268).

During the defense's case, Petitioner also sought to present a witness, Ms. Brenda Peck, who would have testified that she saw "Moose" Thomas inside the restaurant on the weekend prior to the fire. (Vol. X, p. 204) When the State objected, the trial court excluded all evidence of Thomas or his possible involvement in the offense:

> [Defense Counsel]: I have a witness available . . . who would testify that Moose Thomas, who's Charlie Thomas, Charles "Moose" Thomas . . . was in the restaurant on Saturday before the fire and that he was in the restaurant taking his shirt off, striking matches and acting crazy and was asked to leave the restaurant at that time.

> This is the same Charlie "Moose" Thomas who the Court has consistently kept me from bringing anything in about. And if the Court's going to do that, then I'm not going to waste the Court's time of not – of bringing this lady in here and going through that process.
>
> And I will make a proffer that I would ask her – in other words I'll do a bill on it if the Court indicates it's not going to allow me to go into the things about Charlie "Moose" Thomas.

(Vol. X, pp. 204-205) The State again complained that it would take too much time and trouble to call Thomas and others to testify that Thomas was not the arsonist. (Vol X, pp. 205-206) The State asserted that Thomas was "a gentleman of very low I.Q." and therefore incompetent to testify. (Vol. X, pp. 205, 208) The prosecutor further complained:

> If we . . . get into the mere mention of this, then we're going to have at least a half a day or a day. . . . * * *
>
> The best evidence to rebut whatever the allegations are is to put Thomas on the stand, and if he's incompetent, then . . . I can't put him on the stand. I would ask the Court to exclude any reference to Mr. Thomas.

(Vol. X, pp. 207-208) The trial court complied. (Vol. X, p. 208)

C. How the Issues Were Raised and Decided Below

On appeal, Petitioner complained that he had been denied his federal constitutional right to present a defense

by the trial court's preclusion of evidence that another person committed the offense. The Court of Appeals rejected this claim and ruled that because the trial court had "reasonably found that the probative value of Peck's testimony concerning Thomas's behavior several nights before the fire was substantially outweighed by the danger of unfair prejudice and confusion of the issues" and was "within its discretion to exclude Peck's testimony based on Rule 403." *Wiley v. State*, No. 03-99-00047-CR (Tex.App. – Austin, delivered August 10, 2000) (unpublished) (Appendix – B). The Court of Appeals held that the exclusion of evidence that Moose Thomas was seen at the crime scene when the restaurant burned was also within the trial court's discretion based on the same rule of evidence. *Wiley v. State*, *supra*, slip op. at 2. (App. – B at 2).

On petition for discretionary review, the Court of Criminal Appeals held that the defendant must first establish two prerequisites before the Court will entertain a complaint that he was denied his federal constitutional right to present a defense. The defendant must establish first that the evidentiary ruling is "clearly erroneous," and secondly, that it "applies . . . to exclude admissible evidence to such an extent that it effectively prevents the defendant from presenting his defensive theory." *Wiley v. State*, 74 S.W.3d 399, 405 (Tex. Crim. App. 2002) (Appendix – A, pp. 9-10). The Court then decided that Petitioner failed to prove that the trial court erred by excluding the evidence under Rule 403, and accordingly affirmed his conviction.

REASONS FOR GRANTING THE WRIT

The decision by the Court of Criminal Appeals conflicts with this Court's established Sixth and Fourteenth Amendment jurisprudence regarding the exclusion of exculpatory evidence. *See Washington v. Texas*, 388 U.S. 14 (1967); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Crane v. Kentucky*, 476 U.S. 683 (1986); *Rock v. Arkansas*, 483 U.S. 44 (1987); *Rosen v. United States*, 245 U.S. 467 (1918).

The decision by the Court of Criminal Appeals also conflicts with the standard of review employed in other states, namely, in *Commonwealth v. Keizer*, 377 Mass. 264, 385 N.E.2d 1001 (Mass. 1979); *People v. Hall*, 41 Cal.3d 826, 718 P.2d 99 (Cal. Sup.Ct. 1986); *State v. Lowther*, 740 P.2d 1017 (Haw. Ct. App. 1987); *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987); *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (1984); *Smithart v. State*, 988 P.2d 583 (Alaska Sup. Ct. 1999); and *State v. Rolon*, 257 Conn. 156, 777 A.2d 604 (Conn. Sup. Ct. 2001); *State v. Koedatich*, 112 N.J. 225, 548 A.2d 939 (N.J. 1988).

The decision also conflicts with the decisions of federal courts of appeals, namely, in *Johnson v. United States*, 552 A.2d 513 (D.C. App. 1989); *Pettijohn v. Hall*, 599 F.2d 476 (1st Cir. 1979), *cert. denied*, 444 U.S. 946 (1979); *United States v. Robinson*, 544 F.2d 110 (2d Cir. 1976), *cert. den. sub nom. Robinson v. United States*, 434 U.S. 1050 (1978); *Holt v. United States*, 342 F.2d 163 (5th Cir. 1965); *United States v. Green*, 786 F.2d 247 (7th Cir. 1986); *United States v. Crenshaw*, 698 F.2d 1060 (9th Cir. 1983); *United States v. Armstrong*, 621 F.2d 951 (9th Cir. 1980). Accordingly, this Court should grant the writ of certiorari and review the Texas court's decision.

EXPANSION OF ARGUMENTS RELATING TO THE QUESTIONS

The Constitution guarantees persons accused of crimes a "meaningful opportunity to present a complete defense," whether rooted in the Fourteenth or the Sixth Amendment. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). *See also Strickland v. Washington*, 466 U.S. 668, 684-85 (1984) (concluding that the Constitution ensures a fair trial through the Due Process Clause, but defines the elements of a fair trial through Sixth Amendment); *United States v. Nobles*, 422 U.S. 225, 230-31 (1975) (recognizing the right to present a defense in the Compulsory Process Clause).

A State may prohibit the introduction of relevant defensive evidence so long as it has a "valid" reason for doing so. *Chambers v. Mississippi*, *supra*, at 295. However, this Court has also ruled that any limitations imposed on the right to present a complete defense "requires that the competing [state] interest be closely examined." *Id.* In this case, the state interest was that jurors remain free from hearing relevant but potentially confusing or unfairly prejudicial evidence regarding the identity of the arsonist.

The Sixth and Fourteenth Amendments are meant to ensure the defendant a fair opportunity to defend himself against criminal accusation, and thereby preserve the adversarial system of testing the State's theory of guilt. In light of the fundamental nature of the right to present a defense, an application of an evidentiary rule which destroys defensive evidence to the detriment of the adversary system is deserving of heightened judicial scrutiny.

This circumstantial evidence case involved a single issue – the identity of the arsonist. The jury heard all evidence which suggested that Wiley was the culprit, but was precluded from considering evidence that another person or group was the guilty party. The prosecution focused on Wiley as the arsonist, while the defense sought to suggest that others were guilty. The difficulty in understanding that the evidence supports one of these two competing theories is not great. Because the theories are diametrically opposed to one another, they cannot be confused. The issues were joined in no other way. Unless juries are presumed to function at a profoundly imbecilic level, potential jury confusion is not a valid basis for the exclusion of this exculpatory defensive evidence under these circumstances.

The Texas court decided that Thomas' involvement not only threatened a "confusion of the issues" but created an "unfair prejudice" to the prosecution's theory of Wiley's guilt. *Wiley v. State,* 74 S.W.3d 399, 407 (Tex. Crim. App. 2002) (App. – A, p. 7). Evidence which establishes that the identity of the guilty party is someone other than the defendant does in fact "prejudice" the prosecution theory of guilt, but there is nothing unfair about this state of affairs. The clash of competing theories in a trial is the very foundation of the adversary system of justice, and this system is given vitality through the requirement that the defendant have a right to present a defense, that is, a competing theory of the evidence. This rationale is not a valid basis for the exclusion of exculpatory defensive evidence that someone other than the accused committed the offense.

Because there is no valid basis for exclusion of this evidence, the State has deprived Petitioner of his constitutional right to present a defense under the Sixth and Fourteenth Amendments.

Probative Value of the Evidence

The probative value of the excluded evidence is also part of this Court's analysis whether a State has destroyed a defendant's right to present a defense. This case involves a familiar species of defensive theories, namely, that someone other than the accused committed the offense. Courts faced with this issue must determine the probative value "that suffices to require the admission of evidence tending to show that the crime charged was committed by another. . . . " *Wigmore, Evidence*, §139, p 1724-25 n. 2 (Tillers rev. ed 1980). The standard for admissibility for this form of exculpatory evidence has been stated in different ways, but essentially focuses on whether the excluded evidence raised a reasonable doubt of the defendant's guilt. *See, e.g., People v. Hall*, 41 Cal.3d at 833, 718 P.2d at 104 ("To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt."); *State v. Lowther*, 740 P.2d at 1021 (accused has a constitutional right to present all relevant evidence in his defense); *Smithart v. State*, 988 P.2d at 587 ("There is no requirement that the proffered evidence must prove or even raise a strong probability that [the third party] committed the offense. Rather, the evidence need only tend to create a reasonable doubt that the defendant committed the offense. . . . Our focus is on the effect the evidence has upon the defendant's culpability and not the third party's

culpability[, quoting *Johnson v. United States*, 552 A.2d 513, 517 (D.C. App. 1989)]."); *Winfield v. United States*, 676 A.2d 1, 4 (D.C. App. 1996) ("clearly linking" third party to the offense places focus "not on the third party's guilt or innocence, but on 'the effect the evidence has upon the defendant's culpability,' and in this regard it need only tend to create a reasonable doubt that the defendant committed the offense.'") (internal citations omitted); *State v. Rolon*, 257 Conn. at 177, 777 A.2d at 619 ("Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree, so long as it is not prejudicial or merely cumulative."); *State v. Koedatich*, 112 N.J. 225, 548 A.2d 939 (N.J. 1988) ("sufficient if the proof offered has a rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case."); *Commonwealth v. Keizer*, 377 Mass. 264, 385 N.E.2d 1001 (Mass. 1979) (right to present a defense that offense was committed by third party when the evidence would "cast doubt upon the identification of defendant as the person who committed the crime.").

The federal cases implicitly follow the same standard for admission. *See United States v. Armstrong*, 621 F.2d 951 (9th Cir. 1980) ("[f]undamental standards of relevancy . . . require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged."); *Holt v. United States*, 342 F.2d 163 (5th Cir. 1965) (evidence that a third party committed the crime is admissible "where the identity of the defendant is an important issue in a prosecution for a crime"); (where "central issue" is identification, proof that third party is guilty is admissible). *See also Johnson v. United States*, 552 A.2d 513 (D.C. App. 1989); *Pettijohn v. Hall*,

599 F.2d 476 (1st Cir. 1979), *cert. denied*, 444 U.S. 946 (1979); *United States v. Robinson*, 544 F.2d 110 (2d Cir. 1976), *cert. den. sub nom. Robinson v. United States*, 434 U.S. 1050 (1978).

These state and federal decisions are consonant with Wigmore's long-standing admonition that "if evidence is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt." *People v. Hall*, *supra*, at 834 (quoting *Wigmore*, §139, at. 1724). Otherwise, the reasonable doubt standard itself is fatally undermined.

Standard of Review for Exclusion of Evidence of Third Party Guilt

The jury in this case heard only evidence which supported the prosecution's theory of guilt. The jury was prevented from hearing evidence which supported the defense's theory of innocence. The Court of Criminal Appeals approved of this process through a standard of review hostile to the defensive theory, ignoring or discounting facts which supported the defensive theory. This approach not only devalues defensive evidence, but is contrary to this Court's implicit standard of review, as detailed *infra*.

The prosecution theory of this arson trial was that Wiley set fire to his restaurant in order to collect insurance proceeds. The defensive theory was that others, such as a vengeful ex-employee, a convicted arsonist and a suspected arsonist, were more likely suspects. The discretionary court reviewed evidence to support the prosecution theory in the light most favorable to a guilty

verdict, in accordance with this Court's opinion in *Jackson v. Virginia*, 443 U.S. 307 (1979). However, the discretionary court reviewed the excluded defensive evidence in exactly the same light, without support from this Court's decisions and plainly contrary to the approach taken in *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Rock v. Arkansas*, 483 U.S. 44 (1987); *Washington v. Texas*, 388 U.S. 14 (1967); *Rosen v. United States*, 245 U.S. 467 (1918).

While never explicated by this Court, the review of excluded defensive evidence implicitly adopts an approach favorable to its theory. In other words, the review of excluded defensive evidence appears to be conducted in the light most favorable to the defensive theory. In *Rock v. Arkansas*, *supra*, this Court decided that it was unfair to exclude the defendant's own hypnotically refreshed testimony; it did not attack her testimony as self-serving and therefore irrelevant, but assumed that her favorable testimony was necessary to her right to present a defense. In *Washington v. Texas*, *supra*, this Court found the Sixth Amendment was violated by the exclusion of accomplice testimony, and did not disparage it as inherently unreliable or unbelievable. Rather, this Court stressed that "truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving credit and weight of such testimony to be determined by the jury. . . . " In *Chambers v. Mississippi*, *supra*, this Court condemned the use of a rule which excluded the testimony of three witnesses to whom the defendant had confessed. In all these cases, this Court's analysis assumed the relevance of the excluded evidence to the defensive theory, as other states do as well, then

reviewed its exclusion in the light most favorable to the defensive theory. The Texas discretionary court's opinion in this case approached the excluded evidence in exactly the opposite way, contrary to this Court and other state and federal standards of review.

The approach by the Court of Criminal Appeals also conflicts with the burden of proof in criminal trials. The State must prove guilt beyond a reasonable doubt, but such a burden is lightened or removed altogether where exculpatory evidence can be withheld from the jury. Procedural safeguards, most especially appellate review, act as a means of ensuring the integrity of the fact-finding process.

> Truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent.

Rosen v. United States, 245 U.S. 467, 471 (1918).

Due process commands that the accused be protected against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship*, 397 U.S. 264, 358 (1970). This stringent standard of persuasion is necessary to protect interests of "transcending value," i.e., the criminal defendant's liberty, reputation and life. *Speiser v. Randall*, 357 U.S. 513, 525 (1957); *In Re Winship*, 397 U.S. at 363. Justice Frankfurter described the reasonable doubt rule as a notion "basic in our law and rightly one of the boasts of a free society." *Leland v. Oregon*, 343 U.S. 790, 803

(1952) (Frankfurter, J., dissenting). The reasonable doubt burden of proof applies in every trial (unlike other significant rights such as right to juries and counsel) and its breach cannot be considered harmless error.

Surely to be entitled to present such a defense a defendant is not required to first solve the crime and prove the wrongfulness of the accusation; otherwise, defendants really do have a burden of proof, contrary to *In Re Winship*, *supra*. If the State must really prove its case beyond a reasonable doubt, defendants should at least be permitted to present evidence which raises those doubts, leaving jurors to decide their reasonableness. This excluded evidence would have validly raised a reasonable doubt that Mr. Wiley committed the offense. Under the defensive theory, these facts were crucial to raising circumstantially the likelihood that the fire was caused by two arsonists and a disgruntled former employee. In this light, the evidence is neither confusing nor unfairly prejudicial, but easily understood bases for concluding that Wiley's guilt can be reasonably doubted. This evidence circumstantially establishes to some degree the defensive theory that persons other than Mr. Wiley committed the offense, and whether it rises to the level of a reasonable doubt should be left to the jury.

"The Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated *by the jury*." *Washington v. Texas*, 388 U.S. 14, 20 (1967) (emphasis added). The exclusion of relevant exculpatory evidence on the basis of judicial speculation that the proof might be confusing to the jury renders the jury function a nullity. The decision of the

Court of Criminal Appeals therefore conflicts with the Sixth Amendment's guarantee of right to trial by jury by permitting judges to decide the persuasiveness of defenses, then preclude them altogether.

Juries are presumed to deliberate reasonably. Judicial action which assumes that juries are something other than reasonable reverses this presumption. Because the defensive issue in this case is readily comprehensible, the Texas court's decision is contrary to every other standard of review. It violates the Sixth and Fourteenth Amendments to judicially arrogate exculpatory defensive evidence by imagining that the jury would become mired in feeble-minded stupefaction at the supposed inscrutability of a defensive theory that someone else committed the crime.

The trial court should have permitted the evidence to be considered by the jury "because, if . . . it is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative, but should afford the accused every opportunity to create that doubt. A contrary rule is cruel to really innocent accused." *Wigmore*, *supra* at 1723.

PRAYER

Mr. Wiley respectfully requests this Court to grant his writ of certiorari, to reverse the Texas Court of Criminal Appeals' judgment, and remand this cause to the trial court for a new trial.

Respectfully submitted,

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APPENDIX

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Opinion, *Wiley v. State*, 74 S.W.3d 399
(Tex.Crim.App. 2002)
(Appendix – A)

[SEAL]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 1778-00

RONALD CRAIG WILEY, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD COURT OF APPEALS WILLIAMSON COUNTY

COCHRAN, J., ***delivered the opinion of the Court, joined by*** **KELLER, P.J.**, ***and*** **MEYERS, PRICE, HERVEY,** ***and*** **HOLCOMB, JJ. JOHNSON** ***and*** **KEASLER, JJ.**, ***concurred in the judgment.*** **WOMACK, J.**, ***not participating.***

OPINION

Appellant claims that the trial court denied him his constitutional right to present a defense when it excluded portions of his sworn statement to an insurance investigator and testimony by a witness that a different person – a Mr. Thomas – might have had some involvement in

committing the arson for which appellant was convicted.[1] Because we conclude, under the standards set out in *Potier v. State*,[2] that appellant was not deprived of his Sixth Amendment right to present a defense, we affirm the decision of the Third Court of Appeals, which also rejected this contention. *Wiley v. State*, No. 03-99-00047-CR, (Tex. App. – Austin, August 10, 2000) (not designated for publication).

I.

Appellant, Ronald Craig Wiley, owned a restaurant called "Little Bit of Texas Grill and Bar." He opened it in the town of Thrall in February 1995, using some of his own money and $180,000 borrowed from his mother. The restaurant was not a financial success. During the four months that it was open, the restaurant had a net cash loss of $183,000. During those four months, appellant's mother added another $91,000 to the business account.

Before the restaurant opened, appellant had insured the building for $300,000 and its contents for $150,000. In March 1995, appellant increased the insurance coverage on the building's contents to $250,000, and then in May 1995, he increased the coverage on the building itself to $500,000.

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[1] Appellant's Ground for Review was:

The Court of Appeals erred when it held appellant was not deprived of his constitutional right to present a defense.

[2] *Potier v. State*, ___ S.W.3d ___ (Tex. Crim. App., delivered February 13, 2002).

The State offered evidence of several incidents involving gas leaks, combustible containers, and dangerous conditions existing at the restaurant in late May. For example, on May 22nd, appellant reported a gas leak. The gas company employee discovered that the source of the leak was a hole in a flex line going to the central heating unit. A week later, two of appellant's relatives noticed a strong odor of gas coming from inside the restaurant. The same gas company employee came out again. This time he discovered a three-quarter inch gas stop in an "open" position. He also found a propane cannister, a gasoline container, and a turpentine container on the floor in a dining room area. After shutting off the gas, the gas man told appellant's relatives that someone might be trying to burn down the building. The relatives called appellant, who was out of town, and he told them to take care of the problem. They then called the sheriff's department, which sent an officer to investigate and inspect the restaurant on May 30th. During his investigation, the sheriff's officer found several potentially dangerous conditions, including an empty butane cannister with a wide open valve; two plastic gas cans on the floor in one of the dining areas; a hot water heater with an exposed pilot light; and a lit candle on the floor near the front of the restaurant. When the gas company employee returned to the restaurant once again on May 31st, he discovered two more minor gas leaks, which he repaired before turning the gas back on.

Two different witnesses testified that, on June 5th, they saw appellant's truck at the restaurant with a flatbed trailer attached. One of those witnesses helped appellant load a love seat and an end table onto the trailer. The other witness saw someone loading a computer and furniture items onto the trailer. A third witness testified

that, when he drove by the restaurant at about 3:00 a.m. on June 6th, he saw a truck with a flat-bed trailer and a Lincoln Continental[3] parked outside. This witness also testified that he saw several boxes stacked on the trailer.

Appellant testified to the grand jury that he woke up very early on June 6th with a "bad feeling" about the restaurant. He got up and drove to the restaurant at about 6:00 a.m. and discovered that the rear double doors of the restaurant were open. He walked into the restaurant and then heard a loud "whoosh" and saw a flash of light coming from the right dining area.[4] There were no smoke alarms in the building. Appellant ran out of the restaurant, drove to a nearby gas station, and called the fire department. He then drove to his relatives' home and asked his brother-in-law, a volunteer fireman, to get the fire truck. He drove back to the restaurant and waited for the fire department to arrive.

Appellant filed an insurance claim for the damage to the building and its contents.[5] During the insurance company's investigation, appellant gave a sworn interview statement, portions of which were introduced into evidence at trial. The jury heard that, in that interview,

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[3] There was testimony indicating that appellant's girlfriend drove a Lincoln Continental or Town Car.

[4] According to investigators, there was trace evidence of gasoline poured inside the restaurant which indicated that the gas cans that started the fire were set down, gasoline was poured, and the fire immediately set. The trails of gasoline were lit in the center of the restaurant – where appellant testified he was standing when he heard the loud "whoosh" and saw a big flash.

[5] After an investigation, the insurer denied appellant's claim for coverage.

appellant stated that he had received an ominous phone call the day after the restaurant fire. A female called appellant and "said something about heard about your little fire in Thrall, you little arsonist, you watch out how you treat – I've not gotten it right. Watch how you treat people. What comes around goes around or something." Appellant stated that he had fired one of his restaurant employees, Barney Chambliss, in early May, and that he believed Chambliss' dismissal prompted the call.[6] Appellant also admitted that two other properties he had owned had been destroyed by fire. In each case, he recovered insurance proceeds.

During trial, appellant wanted to offer an additional portion of his sworn interview statement to the insurance investigator, to the effect that he had "throwed" a "black guy" out of the restaurant the Saturday night before the fire and then "saw this black guy at 6:00 a.m. in the morning is [sic] almost to the Texaco station up the street. When I come back from my brother-in-law's house he's standing across the street back 100 yards from the restaurant, sitting there watching it burn." This gentleman, later

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[6] At trial, appellant's former girlfriend, who was also the manager of the restaurant, testified that Barney Chambliss was fired because of his drug and alcohol use. She stated that someone had left a telephone message on the restaurant's answering machine stating: "I have a little message for Ronnie. We know about the little fire in Thrall. You just better watch out, you arsonist, and for using people, too." When she attempted to play the message for police investigators, she realized that later incoming messages had erased the threatening call. However, she did play this message for one of appellant's relatives, Debbie Ging. Ms. Ging testified that she heard the threatening call. Ms. Ging also testified that she knew Barney Chambliss was in prison at the time of the June 6th fire.

identified as Charles "Moose" Thomas, was, according to appellant, picked up by the sheriff's department later that morning, but the "deputy fire marshal told me he wasn't the one who done it." The appellant argued that this portion of his out-of-court statement to the insurance investigator was admissible under Rule 106 of the Texas Rules of Evidence[7] because the State had already offered some other portions of that interview.[8] The State objected that "[t]his opens up an entire can of worms . . . it's going to take at last [sic] half a day to put out this fire" because the State would be forced to "warrant [Mr. Thomas] over here[9] . . . bring in his mother[10] . . . bring Dr. Coons[11] . . . bring the prosecutors initially here . . . and the three police officers who saw him the day of the fire who says [sic] that he's nuts." The State pointed out that appellant himself testified to the grand jury that he, appellant, did not think that Mr. Thomas was capable of setting the fire. The trial

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[7] TEX. R. EVID. 106 (Remainder of or Related Writings or Recorded Statements) reads:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may at that time introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. "Writing or recorded statement" includes depositions.

[8] The portions offered by the State had nothing to do with Mr. Thomas.

[9] According to the prosecutor, Mr. Thomas was, by the time of trial, a mentally incompetent patient confined at Rusk State Hospital.

[10] According to the prosecutor, Mrs. Thomas could account for her son's whereabouts until a quarter to 6:00 on the morning of the fire. Further, she would testify that Mr. Thomas' only means of transportation was a bicycle.

[11] Apparently Dr. Coons was the State's psychiatrist.

judge sustained the State's objection, apparently under Rule 403.[12]

Then, during the defense case-in-chief, appellant wanted to offer testimony by another witness, Ms. Peck, to the effect that Mr. Thomas had been in the restaurant the Saturday evening before the fire, that he took his shirt off, was striking matches and "acting crazy," and that he was asked to leave the restaurant. Defense counsel made a proper proffer of her testimony.[13] The trial judge sustained

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[12] The trial judge did not explain the basis of his ruling on the record, but the State's argument for excluding this evidence was couched in terms of "unfair prejudice," "misleading the jury," and "confusion of the issues," all matters covered by Rule 403.

[13] Specifically, the record show the following colloquy:

Defense: I have a witness available. She isn't here this afternoon, but we can get her here fairly quickly or get her here first thing Monday morning who would testify that Moose Thomas, who's Charlie Thomas, Charlie "Moose" Thomas, whatever his name is was in the restaurant on Saturday before the fire and that he was in the restaurant taking his shirt off, striking matches and acting crazy and was asked to leave the restaurant at that time.

This is the same Charlie "Moose" Thomas who the Court has consistently kept me from bringing anything in about. And if the Court's going to do that, then I'm not going to waste the Court's time of not – of bringing this lady in here and going through that process.

And I will make a proffer that I would ask her – in other words, I'll do a bill on it if the court indicates it's not going to allow me to go into the things about Charlie "Moose" Thomas.

State: Your Honor, we have discussed this briefly. Thomas was in the restaurant the Saturday night before. He was – I've talked to Ms. Peck – striking matches in an ashtray. He was asked to leave. Thomas is a gentleman of very low I.Q.

(Continued on following page)

Thomas – if Thomas – according to his mother, she could account for him on the morning of the fire until a quarter of 6:00. Thomas has no vehicle other than a bicycle. Various sheriffs deputies indicate that Thomas – they are well aware that Thomas has very little mental capacity. They saw him at the scene watching the fire like everybody else in Thrall. He did not smell of gasoline or smoke. Mr. Temple will testify that he knows "Moose" Thomas. "Moose" Thomas in his opinion could not get into the restaurant with the doors wide open. This is a sophisticated fire.

If the Court allows this kind of speculative testimony, I'm going to have to get Thomas here himself. I have under subpoena Dr. Richard Coons in Austin. I've got repeated police officers that I'm going to have to bring in. I'm going to have to bring in his mother.

This – we're talking about a highly speculative and most prejudicial piece of speculation before this jury. We're talking probably three or four hours of testimony, and I think it's – there's absolutely no probative value except to let the skunk loose in the jury box. Let the rabbit run across the trail.

The Defendant himself in grand jury testified that he didn't think Thomas had the snap to do this.

Defense: I think there's a little bit more than he was just sitting there striking matches in an ashtray, Your Honor. He was also seen by Mr. Wiley that morning walking across the street from the restaurant.

Now, Judge, I'm not here to mislead you. This is the man I went and talked to in Rusk, and I would be less than candid with the Court if I told you that I believe Mr. Thomas has any kind of serious intellectual capacity. That doesn't preclude him from possibly assisting someone else in starting this fire. I think that we're entitled to go into these areas in presenting our defense.

State: My simple point, Judge, is: If we have – if we get into the mere mention of this, then we're going to have at least a half a day or a day. And there may be some delay getting Thomas himself in here. . . .

(Continued on following page)

the State's objection to this testimony as well, again apparently under rule 403, finding that any probative value would be substantially outweighed by unfair prejudicial effect or confusion of the issues.

Based upon the evidence admitted at trial, the jury convicted appellant of arson and sentenced him to ten years in prison and a $10,000 fine. The Austin Court of Appeals affirmed the conviction. *Wiley v. State,* No. 03-99-00047-CR (Tex. App. – Austin, delivered March 9, 2000). This Court then granted appellant's petition for discretionary review and remanded the case for the court of appeals to consider appellant's constitutional argument that he was denied his Sixth and Fourteenth Amendment rights to due process and to present a defense by the trial court's exclusion of the evidence concerning Mr. Thomas. The court of appeals once again affirmed the conviction, *Wiley v. State,* No. 03-99-00047-CR (Tex. App. – Austin,

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Defense: Well, then I'm going to tell you, Judge, that man isn't going to be competent to testify as a witness in any Court. I would be surprised that he would have that level of competency, quite honestly, at this stage in time.

State: And, further, if he is not a competent witness, then that further adds to my misery – the State's misery.

The best evidence to rebut whatever the allegations are is to put Thomas on the stand; and if he's incompetent, then I don't – I can't put him on the stand. I would ask the Court to exclude any reference to Mr. Thomas.

The Court: Well, at this time, I'm going to sustain the objection to that testimony.

Defense: Your Honor, then I would offer as my bill what I have told this Court as to my understanding of what Ms. Peck would testify to as a Bill of Exceptions to the Court's ruling.

delivered August 10, 2000) (op. on remand), and this Court once again granted his petition for discretionary review.

II.

In *Potier v. State*, ___ S.W.3d ___ (Tex. Crim. App., delivered February 13, 2002), this Court noted that "[e]rroneous evidentiary rulings rarely rise to the level of denying the fundamental constitutional rights to present a meaningful defense." ___ S.W.3d at ___ (slip op. at 11). As explained in *Potier*, there are two distinct scenarios in which rulings excluding evidence might rise to the level of a constitutional violation: 1) a state evidentiary rule which categorically and arbitrarily prohibits the defendant from offering otherwise relevant, reliable evidence which is vital to his defense;[14] and 2) a trial court's clearly erroneous ruling excluding otherwise relevant, reliable evidence which "forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense."[15] In the first category, the constitutional infirmity is in the arbitrary rule of evidence itself. In the second category, the rule itself is appropriate, but the trial court erroneously applies the rule to exclude admissible evidence to such an extent that it effectively prevents the defendant from presenting his defensive theory.[16] In other

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[14] *See Potier*, ___ S.W.3d at ___-___ (slip op. at 4-8) (concluding that U.S. Supreme Court cases "show that the exclusion of relevant material, important evidence by the application of particular rules that are arbitrary or disproportionate to their purposes may offend the constitution").

[15] *Id.*, ___ S.W.3d at ___ (slip op at 14).

[16] *See id.* at ___ (slip op. at 11-14).

words, the erroneous ruling goes to the heart of the defense.

In this case, the trial judge had the discretion to exclude appellant's out-of-court statement to the insurance investigator and Ms. Peck's testimony concerning the conduct of the "crazy" Mr. Thomas because the probative value of this testimony was substantially outweighed by the danger of unfair prejudice and confusion of the issues. This is precisely what the Austin Court of Appeals concluded. Appellant does not complain that Rule 403 is itself an arbitrary rule that discriminates against his right to present a defense. Thus, he does not contend that a state evidentiary rule categorically prevented him from offering otherwise relevant, reliable evidence which was vital to his defense.

Appellant simply argues that he should have been entitled to present evidence that a known "fire-starter,"[17] Mr. Thomas, "was thrown out of the restaurant a few days prior to the fire, and, in fact, was standing across the street watching it burn." According to appellant, had the jury been permitted to hear evidence that another person could have committed the offense, they might have entertained a

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[17] Mr. Thomas had been convicted of attempted arson in 1992. Of course, neither the defendant nor the State may offer evidence that a person is a "known fire-starter." This is prohibited character evidence under Rule 404. Indeed, one of appellant's points of error was that the State violated rule 404(b) by offering evidence that two of appellant's buildings had burned down in 1989 and 1991 and he had collected insurance proceeds on them. This evidence was offered, however, not to show appellant was a "fire-starter" type of person but to show a common motive – recovery of insurance proceeds – underlying all three fires.

reasonable doubt as to Appellant's guilt. Thus, he relies upon the second type of evidentiary ruling which could conceivably rise to a constitutional violation: a clearly erroneous ruling which excludes admissible evidence and which effectively prevents the defendant from presenting his defense.

In this case, however, appellant has not shown that the trial judge's Rule 403 ruling was erroneous. Appellant wanted to offer evidence suggesting that perhaps the incompetent Mr. Thomas could have "assisted" someone else in starting the restaurant fire.[18] In other words, Mr. Thomas was a possible assistant to an "alternate perpetrator."

In weighing probative value against Rule 403 counter-factors, courts must be sensitive to the special problems presented by "alternative perpetrator" evidence. Although a defendant obviously has a right to attempt to establish his innocence by showing that someone else committed the crime, he still must show that his proffered evidence regarding the alleged alternative perpetrator is sufficient, on its own or in combination with other evidence in the record, to show a nexus between the crime charged and the alleged "alternative perpetrator."[19]

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[18] Defense counsel forthrightly admitted to the trial judge that he did not believe Mr. Thomas had the "intellectual capacity" to plan, organize, and carry out this arson, but "[t]hat doesn't preclude him from possibly assisting someone else in starting this fire." There was, however, no evidence to support the logical chain of inferences that Mr. Thomas did, in fact, assist someone else in starting the fire.

[19] *See, e.g., Matthews v. Price,* 83 F.3d 328, 332 (10th Cir. 1996) (noting, in federal habeas proceeding, that state court had held that "a

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Appellant has not met that burden. In fact, appellant's proffered evidence suggesting that the mentally incompetent Mr. Thomas set this sophisticated fire is both meager and speculative.[20] As noted above, appellant himself told the grand jury that he did not think Mr. Thomas was capable of setting this fire. Nor did any of the investigating officers. The fact that Mr. Thomas was "thrown out" of the restaurant several days earlier for taking off his shirt, striking matches, and acting "crazy" does not show that it is logical or likely that he could enter the closed and locked restaurant without forced entry, then assemble gas cans in a particular dining area, dribble gasoline trails and set fire to them, and somehow escape from the otherwise closed and locked restaurant just as appellant was walking in the only open door to hear the "whoosh" of the fire igniting. The fire marshal and sheriff's department concluded that Mr. Thomas was not capable of starting this fire. Other

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defendant may not present evidence that another was an alternate suspect of a crime without proof that the other person committed some act directly connecting him to the particular charged offense"); *see also State v. Woods*, 508 S.W.2d 297, 300 (Mo. App. 1974) ("evidence that another person had an opportunity or motive for committing the crime for which the defendant is on trial is not admissible absent proof that the other person committed some act directly connecting him with the crime").

[20] *Compare United States v. Stevens*, 935 F.2d 1380, 1401-06 (3d Cir. 1991) (when defendant claimed mistaken identity in aggravated sexual assault prosecution, it was error to exclude testimony by another victim that a different person resembling the defendant assaulted her in similar manner on same base within a few hundred yards). In *Stevens*, unlike the present case, there was direct evidence that an "alternate perpetrator" did, in fact, exist and that this person had, in fact, committed another offense precisely like the charged one during the same time period and in the same vicinity. There was no speculation concerning the existence or conduct of the alternate perpetrator.

evidence that Mr. Thomas could not be the arsonist included proffered evidence from the State that Mr. Thomas' mother could account for his whereabouts until a quarter of six in the morning – since this was merely fifteen minutes before the fire started, there would not appear to have been sufficient time for him to ride to the restaurant on his bicycle, open the locked rear doors without forced entry, assemble the gas cans, dribble the gasoline, start the fire, and escape without appellant seeing him.

Even if we assume that the evidence concerning Mr. Thomas had some marginal relevance, that proffered evidence cannot survive the balancing test under Rule 403. The probative value of this testimony was slight because of its highly speculative nature. The testimony did, however, present a great threat of "confusion of the issues"[21] because it would have forced the State to attempt to disprove the nebulous allegation that perhaps Mr. Thomas was somehow involved as an assistant to some unknown sophisticated arsonist in burning down appellant's restaurant.[22] This side trial might have led the jury

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[21] The danger of "confusion of the issues" and "misleading the jury" arises when circumstantial evidence tends to sidetrack the jury into consideration of factual disputes only tangentially related to the facts at issue in the current case. The classic explanation of this danger comes from Dean Wigmore: "The notion here is that, in attempting to dispute or explain away the evidence thus offered, new issues will arise as to the occurrence of the instances and the similarity of conditions, [and] new witnesses will be needed whose cross examination and impeachment may lead to further issues." 2 John H. Wigmore, Evidence § 443, at 528-29 (Chadbourn rev. 1979). In short, the evidence is a "rabbit trail."

[22] Appellant raised the question of whether Barney Chambliss, the fired restaurant employee, might have a motive to commit this arson. There was, however, no evidence linking Mr. Thomas and Mr. Chambliss

(Continued on following page)

astray, turning the focus away from whether appellant – the only person whose actions were on trial – set his restaurant on fire. It also presented a threat of "unfair prejudice," as it would invite the jury to blame an absent, unrepresented, incompetent person for an arson when there was not a scintilla of evidence that he was actually involved.[23] Appellant did not at trial, nor on appeal, ever make any connection between the mere presence of Mr. Thomas near the fire and any act he might have committed to set the fire or assist another in setting the fire. As was noted by the Tenth Circuit in the Timothy McVeigh case:

> It is not sufficient for a defendant merely to offer up unsupported speculation that another person may have done the crime. Such speculative blaming intensifies the grave risk of jury confusion, and it invites the jury to render its findings based on emotion or prejudice.[24]

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and, according to appellant's own witness, Mr. Chambliss was in prison at the time of the fire.

[23] *See United States v. McVeigh*, 153 F.3d 1166, 1191 (10th Cir. 1998) ("alternative perpetrator" evidence admissible only when record shows sufficient connection between charged crime and alleged alternative perpetrator; defendant may not merely offer "unsupported speculation" that another person may have committed offense), *cert. denied*, 119 S.Ct. 1148 (1999).

[24] *Id.* at 1191. *See generally* 40A Am. Jur. 2d Homicide § 286 (1999) ("In order to generate reasonable doubt as to the defendant's guilt, evidence may thus be submitted which tends to show that the crime was committed by a third person, but only if sufficient foundation is laid, which requires the introduction of evidence with an inherent tendency to connect the third person with the commission of the crime for which defendant is charged"); 22A C.J.S., Criminal Law, § 622b, 451 ("[t]he evidence, to be admissible, must be such proof as directly

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The trial judge's ruling in this case did effectively preclude appellant from presenting *some* of his evidence that *perhaps* Mr. Thomas was *somehow* involved in the commission of this arson. But appellant has failed to show how the trial judge's ruling was erroneous, much less so clearly erroneous that it violated his constitutional rights. This evidence was, at best, only marginally relevant. It was highly speculative. The "Mr. Thomas" evidence is precisely the type of emotionally-freighted but speculative evidence that trial judges properly exclude under Rule 403, whether offered by the State or the defendant.

In sum, we conclude that the court of appeals properly held that appellant was not deprived of his constitutional right to present a defense because the trial judge did not abuse its discretion in excluding testimony concerning Mr. Thomas under Rule 403. Therefore, we affirm the judgment of the court of appeals.

Cochran, J.

Delivered: March 27, 2002

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connects the other person with the corpus delicti, and tends clearly to point out someone besides accused as the guilty person. Disconnected and remote acts, outside the crime itself cannot be separately proved for such purpose; and evidence which can have no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.").

Opinion, *Wiley v. State,* No. 03-99-00047-CR
(Tex.App. – Austin, delivered August 10, 2000)
(designated unpublished) (Appendix – B)

**TEXAS COURT OF APPEALS,
THIRD DISTRICT, AT AUSTIN**

ON REMAND

NO. 03-99-00047-CR

Ronald Craig Wiley, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF WILLIAMSON COUNTY, 26TH JUDICIAL DISTRICT NO. CR-98-173-K26, HONORABLE WILLIAM LOTT, JUDGE PRESIDING

We affirmed appellant Ronald Craig Wiley's conviction for arson on original submission. *See Wiley v. State,* No. 03-99-00047-CR (Tex. App. – Austin Mar. 9, 2000) (not designated for publication). Appellant petitioned for discretionary review, complaining among other things that we did not address the contention that he was denied his constitutional right to present a defense. The court of criminal appeals granted review on that ground only, vacated our judgment, and remanded the cause for this Court to address the constitutional issue. *See Wiley v. State,* No. 732-00 (Tex. Crim. App. June 28, 2000) (not designated for publication). Because the issue was fully briefed on original submission, supplemental briefing was

not required. *See Bell v. State,* 956 S.W.2d 560, 561 (Tex. Crim. App. 1997).

Appellant sought to present a witness who would have testified that she saw Charles Thomas, who was convicted of attempted arson in 1992, inside the building three days before the fire. The district court excluded this testimony pursuant to Texas Rule of Evidence 403. Appellant contends this ruling violated his constitutional rights to due process and due course of law, and to compulsory process. *See* U.S. Const. amends. VI, XIV; Tex. Const. art. I, § 10, 19. Appellant does not present separate arguments under the federal and state constitutions.

Few rights are more fundamental than that of the accused to present witnesses in his own defense. *See Chambers v. Mississippi,* 410 U.S. 284, 302 (1973). In the exercise of this right, however, the accused must comply with established rules of procedure and evidence. *See id.* Rule 403 authorizes the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues. *See* Tex. R. Evid. 403. Appellant does not argue that rule 403 is unconstitutional on its face, and could not. Trial courts must be given wide latitude under the constitution to exclude evidence that is repetitive, marginally relevant, or poses an undue risk of harassment, prejudice, or confusion of the issues. *See Crane v. Kentucky,* 476 U.S. 683, 689-90 (1986); *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986).

We explained in our original opinion why we believe the district court did not abuse its discretion under rule 403 by excluding the proffered testimony. For the same reasons, the court did not abuse its constitutional discretion to exclude unfairly prejudicial, confusing, or marginally relevant

evidence. Appellant's constitutional right to present witnesses in his own behalf was not violated. Issue one is overruled.

Our disposition of appellant's remaining issues was not disturbed by the court of criminal appeals. The judgment of conviction is affirmed.

Jan P. Patterson, Justice

Before Justices Jones, Kidd and Patterson

Affirmed on Remand

Filed: August 10, 2000

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White Card of Denial of Motion for Hearing (Appendix C)

OFFICIAL NOTICE FROM COURT OF CRIMINAL
APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

May 15, 2002
COA#: 03-99-00047-CR
RE: Case No. 1778-00
STYLE: WILEY, RONALD CRAIG

On this day the Appellant's Motion for Rehearing was denied.

Troy C. Bennett, Jr., Clerk

KEITH S HAMPTON
502-B WEST 14TH STREET
AUSTIN TX 78701